92-850

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH W. TEAGUE and HELEN B. TEAGUE, STEVEN ALLEN BARKER, RITA STRAHOWSKI, and SWANNEE BECK, Lifetime Partners of PTL, as Representatives of a Nationwide Class Consisting of 150,290 Lifetime Partners and of 27,839 Persons Who Have Partially Paid for Lifetime Partnerships,
Petitioners

v.

EMPLOYERS REINSURANCE CORPORATION,
Respondent

JAMES O. BAKKER, DAVID A. TAGGART, and AIMEE CORTESE,
Defendants

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether, in critical aspects of summary judgment left unresolved by this Court in *Celotex*, *Matsushita*, and *Anderson*, the court below conflicted with other circuits in sustaining summary judgment against the PTL Lifetime Partner class?

A. Whether, contrary to the distinction in *Celotex* between the summary judgment standard where the moving party lacks and has the burden of persuasion at trial, the court below erroneously imposed on the nonmoving party the burden it would have if it had the burden of persuasion at trial (a burden which the nonmoving PTL Lifetime Partner class would lack and the moving insurer actually would have), following inconsistent dicta in *Matsushita* that have become a point of confusion in other circuits?

B. Whether, contrary to this Court's holding in *Anderson* that "the judge's function is not himself to weigh the evidence," the court below weighed the evidence and thereby concluded that Employers Reinsurance would win at trial and should win on summary judgment, relying on inconsistent language in *Anderson* and *Matsushita*, which has become a point of confusion in the circuits?

C. Whether, contrary to this Court's rejection in *Celotex* of the argument that "the nonmoving party must produce evidence in a form that would be admissible at trial," the court below excluded and ignored the Lifetime Partner Class's evidence that it found inadmissible (mistakenly), and thereby excluded and ignored affidavits of experts and affidavits offering insurer documents that demonstrated genuine issues of material fact, following inconsistent language in *Anderson* and *Matsushita*, which has become a point of confusion in the circuits?

II. Whether, in making a priori assumptions contrary to settled rules of insurance policy construction, the court below conflicted with this Court and other circuits and the North Carolina Supreme Court, and followed a too-frequent pattern of sustaining summary judgment based on handicapped predictions about the preponderance of evidence at trial that the PTL Lifetime Partner class would present?

A. Whether the perfunctory sustaining of summary judgment was contrary to this Court's and other circuits' rule that "significance must be given to each word" in any insurance policy and all evidence "must be viewed in the light most favorable" to the nonmoving party, and whether following that rule shows coverage of the PTL Lifetime Partner Class's claims or at least ambiguity requiring trial?

B. Whether the perfunctory sustaining of summary judgment was contrary to this Court's and other circuits' rule that extrinsic evidence must be considered to decide whether there is latent ambiguity, and whether following that rule shows coverage of the PTL Lifetime Partner Class's claims or at least ambiguity requiring trial?

C. Whether the perfunctory sustaining of summary judgment was contrary to this Court's and other circuits' rule that extrinsic evidence may be used to show the circumstances of entering the policy, the insurer's practices, and industry practices, and whether following that rule shows coverage of the PTL Lifetime Partner Class's claims or at least ambiguity requiring trial?

LIST OF PARTIES

The parties to the proceedings below were the petitioner PTL Lifetime Partner class (certified by the district court), the co-defendants Jim Bakker, David Taggart, and Aimee Cortese, and the respondent Employers Reinsurance Corp.

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OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unreported, and is reprinted in the appendix at A-1 *infra*. The memorandum opinion of the United States District Court for the Western District of North Carolina is unreported, and is reprinted in the appendix at A-9 *infra*.

JURISDICTION

Federal jurisdiction exists under 28 U.S.C. § 1332. Summary judgment was entered on October 17, 1991, with a Rule 54(b) judgment on November 14, 1991. The Fourth Circuit affirmed on August 14, 1992, and denied rehearing and rehearing en banc on October 14, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1291 is quoted in the appendix.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

Employers Reinsurance (ERC) filed this declaratory judgment action to determine whether its "Multimedia Liability Policy" covers the $129,747,618 judgment against Jim Bakker obtained by the certified class of PTL Lifetime Partners for common law fraud. The district court denied the Lifetime Partners' motion to intervene, and the Fourth Circuit reversed. *Teague v. Bakker,* 931 F.2d 259, 260-61 (4th Cir. 1991). The district court then entered summary judgment against the Lifetime Partners, and a panel of the Fourth Circuit affirmed, with rehearing en banc denied.

B. STATEMENT OF THE FACTS

The 150,000 members of the PTL Lifetime Partner Class are people who made non-deductible investments averaging $1,000 for Partnerships offering three free nights annually at Heritage U.S.A. The Class responded to statements by Jim Bakker in brochures pub-

lished and mailed to millions of people, and over television programs broadcast to millions of people. This case involves the rights of those 150,000 victims to collect under applicable insurance, which PTL and Bakker bought, and which has not paid a dime to anyone.

1. **Basis of the $129 Million Judgment in Jim Bakker's Oversales and Looting**

The description in the earlier appellate opinion is correct:

> Bakker planned to finance these projects by selling lifetime partnerships. He offered eleven different partnership programs ranging in cost from $500 to $10,000. Eight of the partnerships promised benefits that included annual lodging in one of the Heritage Village facilities. In January 1984, appellant began using the mail to solicit lifetime partners. Also, from February 1984 through May 1987, Bakker used broadcasts carried on the PTL Television Network and various commercial affiliates to solicit lifetime partners. Many of these partners drew on meager incomes to purchase Heritage Village lodging benefits. Appellant raised at least $158 million through the sale of approximately 153,000 partnerships with lodging benefits.
>
> Bakker promised television viewers that he would limit the sale of partnerships to ensure that each partner would be able to use the facilities annually. Appellant, however, oversold the partnerships. He promised, for instance, to limit the sale of Grand Hotel partnerships to 25,000 but actually sold 66,683. In addition, Bakker used relatively few of the funds solicited from the partners to construct promised facilities. In fact, of the proposed Heritage Village facilities, only the Grand Hotel and one bunkhouse were actually completed. Instead, Bakker used partnership funds to pay operating expenses of the PTL and to support a lavish lifestyle. This extravagant living included gold-plated fixtures and a $570 shower curtain in his bathroom, transportation in private jets and limousines, an air-conditioned treehouse for his children and an air-conditioned doghouse for his pets. This combination of overselling partnerships and diverting partnership proceeds meant that the overwhelming majority of the partners never received the lodging benefits Bakker promised them.

United States v. Bakker, 925 F.2d 728,731-32 (4th Cir.1991).

2. The PTL/Bakker Multimedia Insurance Policy

The "Multimedia Liability Policy,"[1] which listed Bakker as a named insured, covered ten torts. There is no dispute that the other nine torts were intentional torts, but the summary judgment ruling was that the tenth did not cover any intentional tort:

> negligent error, omission, misstatement or misleading statement,
> committed or alleged to have been committed in the . . . utterance or dissemination of matter published, . . . distributed, . . . broadcast, telecast, cablecast, . . . or advertised during the policy period by or with the permission of the Insured. [Policy § I(a)(7) (A.2).]

The Lifetime Partner Class' judgment for $129,000,000 was based on Jim Bakker's "misstatement or misleading statement" by television broadcasts and mailed advertisements about Lifetime Partnerships. Broadcasts and mailed advertisements came within the coverage language that embraced such misstatements or misleading statements "committed or alleged to have been committed in the . . . utterance or dissemination of matter published, . . . distributed, . . . broadcast, . . . or advertised during the policy period by or with the permission of the Insured." (A.2.)

3. Intrinsic Evidence about the Multimedia Policy's Meaning

Critical features of the Multimedia Policy itself show that it covers the Lifetime Partner Class's judgment against Bakker:

> "Misstatement or misleading statement" was policy language that must mean something other than mere types of "negligent error" in order to "give significance to each word" and to avoid rendering the phrase superfluous.

> The proposed version of the policy (Broadcasters Broad Form) had a clear negligence restriction and fraud exclusion, which were deleted in the Multimedia Policy for a 50% premi-

[1] "Multimedia" referred to coverage of not just broadcasting but publication and advertising.

um increase (*Compare* A.1 with A.436.)

> The Multimedia Policy contained other clauses where the first adjective only modified the next noun and not the string of nouns. (A.3-4.)

> The policy's crime exclusion was retained when its civil fraud exclusion was deleted. (A.3.)

> The policy's coverage of punitive damages meant coverage of the intentional torts generating such damages including civil fraud. (A.417, A.384, A.424, A.418.)

> The policy's other coverages were all intentional torts, most of which could occur by fraudulent misstatements or fraudulent misleading statements, which would make it odd to limit the separate "misstatement or misleading statement" category to negligence only. (A.2.)

Moreover, admissions were made by ERC agents:

> The coverage of negligent or non-negligent "misstatement or misleading statement" was admitted by two ERC agents. (A.056-57, 068.)

> The ambiguity of the policy language was admitted by an ERC underwriter, an ERC agent, and an ERC attorney. (A.163, 168, 165; A.143-45; A.306.)

> The possible coverage of the Teague class action was acknowledged by ERC's agent, Marsh & McLennan, and by PTL. (A.1051, 1053.)

4. Extrinsic Evidence about the Multimedia Policy's Meaning

All the extrinsic evidence was in other *ERC documents* (not merely in third party documents), and all of it involved the admissible categories of the circumstances of entering the policy and ERC's own practices:

> Alternative policy language, which was initially present then deleted here, was used in every other ERC policy cover-

ing "misstatement and misleading statement" to limit that coverage clearly to negligence ("misstatement and misleading statement *arising out of* negligent error or omission"). (A.327, 337, 348.)

> An express fraud exclusion, which also was deleted here, was used in every other ERC policy covering "misstatement or misleading statement" and in every other ERC policy covering "negligent error or omission," to limit that coverage clearly to negligence. (A.327, 337, 348; A.331-32, 336, 427, 430A, 339, 340, 341, 343, 344, 346, 416.)

> The policy offered the "expanded coverages the broadcaster needs in today's marketplace," according to ERC's flyer that was sent to PTL and Bakker just before they bought the policy, and ERC internally agreed to offer its broadest coverage, in light of what ERC called the unusually "sizable premium." (A.413, 1045-46.)

> The policy covered all types of "misstatements and misleading statements," without any negligence restriction, and included "broader coverages," according to the description of the Multimedia Policy in ERC's brochure: "Options now available include coverage of newsgathering activities, misstatements, misleading statements and personal injury." (A.325.)

Presumably, ERC's documents meant what they said, having been written by the swarms of lawyers working for that multibillion dollar subsidiary of General Electric.

All that ERC had to do in 1982 to withdraw coverage of fraudulent misstatement and misleading statement was *to say it unambiguously* in any number of ways:

To use its normal phrase (which it deleted) "misstatement or misleading statement as a result of negligent error", *or*

To add its usual exclusion (which it deleted) of "any dishon-

est, fraudulent or criminal act", *or*

To say "negligent error, negligent omission, negligent misstatement or negligent misleading statement".

ERC chose not to use any of those negligence limitations, and instead deleted the clear negligence language and the clear fraud exclusion in exchange for the 50% increase in the premium.

REASONS FOR GRANTING THE WRIT

I. IN CRITICAL ASPECTS OF SUMMARY JUDGMENT LEFT UNRESOLVED BY THIS COURT IN CELOTEX, MATSUSHITA, AND ANDERSON, THE COURT BELOW CONFLICTED WITH OTHER CIRCUITS IN SUSTAINING SUMMARY JUDGMENT AGAINST THE PTL LIFETIME PARTNER CLASS

This case raises important questions not resolved in this Court's trilogy of summary judgment decisions in *Celotex*,[2] *Matsushita*,[3] and *Anderson*[4] in 1986, and also raises important questions that were resolved in those cases but are not uniformly followed by the appellate courts: (A) whether the moving party has a different burden on summary judgment depending on whether it has the burden of persuasion on the issue at trial, (B) whether the courts may weigh the evidence to predict the preponderance at trial and to summarily judge against the predicted loser, and (C) whether the nonmoving party may meet its burden by producing evidence that may not be admissible at trial. These questions are related to the issues that closely divided this Court in the trilogy of 1986 decisions, and that commentators

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[2]Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

[3]Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

[4]Anderson v. Liberty Lobby, 477 U.S. 242 (1986).

have said were inconsistently resolved in those decisions.

A. CONTRARY TO THE DISTINCTION IN CELOTEX BETWEEN THE SUMMARY JUDGMENT STANDARD WHERE THE MOVING PARTY LACKS OR HAS THE BURDEN OF PERSUASION AT TRIAL, THE COURT BELOW ERRONEOUSLY IMPOSED ON THE NONMOVING PARTY THE BURDEN IT WOULD HAVE IF IT HAD THE BURDEN OF PERSUASION AT TRIAL, FOLLOWING INCONSISTENT DICTA IN MATSUSHITA THAT HAS BECOME A POINT OF CONFUSION IN OTHER CIRCUITS

1. Division on Summary Judgment Burden Varying with Trial Burden

Celotex, as *Anderson*, involved a motion for summary judgment by the party who *did not* have the burden of persuasion on the issue at trial. Such a party indeed *does not* have the burden of establishing the absence of genuine issues of material fact. However, this case involves a motion for summary judgment by the party who *does* have the burden of persuasion at trial, and such a party *does* have the burden of establishing the absence of genuine issues of material fact. The majority made that distinction in clear terms:

> Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, *and on which that party will bear the burden of proof at trial*. . . .

477 U.S. at 322. The dissent by Justice Brennan, Chief Justice Burger, and Justice Blackmun made the same distinction (Justice Stevens dissented separately):

> The burden of production imposed by Rule 56 requires the moving party to make a prima facie showing that it is entitled to summary judgment. 10A Wright § 2727. The manner in which this showing can be made *depends upon which party will bear the burden of persuasion on the challenged claim at trial.* [1] If the *moving party will bear the burden of persuasion at trial*, that party *must support its motion with credible evidence*--using any of the materi-

> als specified in Rule 56(c)--that would entitle it to a directed verdict if not controverted at trial. Ibid. Such an affirmative showing shifts the burden of production to the party opposing the motion and requires that party either to produce evidentiary materials that demonstrate the existence of a "genuine issue" for trial . . . .
>
> [2] If the *burden of persuasion at trial would be on the nonmoving party*, the party moving for summary judgment may satisfy Rule 56's burden of production in either of two ways. First the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. See 10A Wright § 2727, pp. 130-131; Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L.J. 745, 750 (1974) . . . .
>
> . . . .
>
> . . . Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. *Ante*, at 323. . . . [T]he moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.
>
> . . . .
>
> I do not read the Court's opinion to say anything inconsistent with or different from the preceding discussion....

Celotex Corp. v. Catrett, 477 U.S. at 331-34.

Similarly, *Anderson* involved a motion for summary judgment by the party that *did not* have the burden of persuasion, and stated the rule the same way. 477 U.S. at 256.

Matsushita, by contrast, involved a motion for summary judgment by the party who *did* have the burden of persuasion on the issue at trial, and was decided three months before *Celotex*. The Court did not make the foregoing distinction, stating the burden of the *nonmoving* party to "establish that there is a genuine issue of material fact," but stating that the burden of the *moving* party in its motion or in its reply "is not before us." 475 U.S. at 585 n.10.

2. Erroneous Burden in This Case

ERC had the burden of persuasion at trial on noncoverage, both because it was the plaintiff and because settled presumptions were required in favor of the insureds.[5] The insureds here produced the intrinsic evidence summarized at pages 3-4 *supra* as well as the extrinsic evidence that should have been considered in determining whether there is ambiguity (pages 21-25 *infra*).

The court below did not require ERC to meet its burden on summary judgment (to "demonstrate that there is *no* evidence in the record to support a judgment for the nonmoving party"). Instead, the court below effectively extended the *Celotex* rule for moving parties *without* the burden of persuasion to apply to motions by parties *with* that burden. (The only showing made by ERC was to produce its complaint and the insurance policy.) The court below effectively extended *Celotex*, *Anderson*, and *Matsushita* to nonmoving parties (the Lifetime Partner Class) who do not have the burden of persuasion at trial, and placed no burden on the moving party (ERC, with the burden of persuasion at trial) except that it flatly allege that there were no genuine issues of material fact. After the Lifetime Partner Class responded, the court below did not place any burden whatsoever on ERC, even to respond to affidavits and intrinsic evidence.

The decision of the court below therefore conflicts with deci-

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[5] *E.g.*, 13 *Appleman's Insurance Law and Practice* § 7401, at 197 et seq. ("almost the unanimous holding of all courts that insurance contracts must be liberally construed in favor of a policyholder or beneficiary"); Stipcich v. Metropolitan Life Ins. Co., 277 U.S. 311, 322 (1928) (same); North Carolina Farm Bureau Mutual Insurance Co. v. Stox, 412 S.E.2d 318, 325-26 (N.C. 1992) (undefined term is construed for coverage); Jamestown Mutual Ins. Co. v. Nationwide Mutual Ins. Co., 266 N.C. 430, 146 S.E.2d 410, 416 (1966) (refusing insurer's slippery words and allowing coverage by broad words).

sions from other circuits. *See Resolution Trust Corp. v. Gill*, 960 F.2d 336, 340 (3d Cir. 1992); *Anchorage Associates v. Virgin Islands Bd. of Tax Review*, 922 F.2d 168, 175 (3d Cir. 1990); *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1264-65 (5th Cir. 1991); *Bruning v. Pixler*, 949 F.2d 352, 356-57 (10th Cir. 1991); *Chanel, Inc. v. Italian Activewear, Inc.*, 931 F.2d 1472, 1477 (11th Cir. 1991).

B. CONTRARY TO THIS COURT'S HOLDING IN ANDERSON THAT "THE JUDGE'S FUNCTION IS NOT HIMSELF TO WEIGH THE EVIDENCE," THE COURT BELOW WEIGHED THE EVIDENCE AND THEREBY CONCLUDED THAT EMPLOYERS REINSURANCE WOULD WIN AT TRIAL AND SHOULD WIN ON SUMMARY JUDGMENT, FOLLOWING INCONSISTENT LANGUAGE IN ANDERSON AND MATSUSHITA, WHICH HAS BECOME A POINT OF CONFUSION IN THE CIRCUITS

The Lifetime Partner Class, as the nonmoving party, proved the existence of genuine issues of material fact by the nonexcluded evidence as well as by the wrongly excluded evidence. However, the court below did not stop by finding the Rule 56 requirement met by a showing of genuine issues of material fact, but proceeded to weigh that evidence and predict the weight that would be found at trial. *See* slip op. at 5-6.

1. Division on Weighing Evidence

Rule 56(c) allows summary judgment only when "there is *no* genuine issue as to *any* material fact." It does not authorize weighing of the evidence. This is why, rather than weighing, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita*, 475 U.S. at 587, quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). This is also why "material" facts are "disputes over facts that *might* affect the outcome of the suit under the governing law," not those that

do affect the outcome. *Anderson*, 477 U.S. at 248.

Anderson expressly barred any weighing of evidence:

> [I]t is clear enough from our recent cases that at the summary judgment stage the judge's function is *not himself to weigh the evidence and determine the truth of the matter* but to determine whether there is a genuine issue for trial. . . . [T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. . . .
>
> . . . .
>
> If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. . . .

477 U.S. at 249-50.[6] In determining materiality, the Court further said that "[a]ny proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry ...." *Id.* at 248. Yet the dissents found other language in the majority opinion troubling because it seemed to suggest some weighing:

> I simply cannot square the direction that the judge "is not himself to weigh the evidence" with the direction that the judge also bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quality" to meet that "quantum." I would have thought that a determination of the "caliber and quality," i.e., the importance and value, of the evidence in light of the "quantum," i.e., amount required could *only* be performed by weighing the evidence. . . .
>
> . . . [I]f the judge on motion for summary judgment really is to weigh the evidence, then in my view grave concerns are raised concerning the constitutional right of civil litigants to a jury trial.

Id. at 266-67 (Brennan, J., dissenting). *See also id.* at 272 (Rehnquist, J., dissenting with Burger, C.J.).

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[6]Similarly, *Celotex* did not require or allow weighing of evidence, but simply sustained summary judgment if there were "a *complete* failure of proof concerning an essential element of the nonmoving party's case," and if the Insurer "demonstrate[d] . . . that the claims and defenses have *no* factual basis." 477 U.S. at 323, 327 (majority opinion). *Accord, id.* at 328 (White, J., concurring), 332 (Brennan, J., dissenting, with Burger, C.J., and Blackman J.)

However, *Matsushita* seems to authorize weighing of evidence by saying that the showing of a "genuine" issue must be "more than simply showing that there is some metaphysical doubt as to the material facts," that "if the factual context renders respondents' claim implausible . . . respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary," and that the "expert study" relied on by the nonmovant "has little probative value." 475 U.S. at 586-87, 594 n.19. The dissent objected on precisely that ground:

> Such language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the *weight of the evidence* favors the plaintiff. Cities Service and Montsanto do not stand for any such proposition. . . .

Id. at 600 (White, J., dissenting, with Brennan, Blackmun, and Stevens, JJ.). As in this case, the lower court simply "ignores the contrary conclusions of respondents' expert DePodwin, whose report in very relevant part was erroneously excluded by the District Court," and which "Report [affidavit] alone creates a genuine factual issue" that should have prevented summary judgment. *Id.* at 601, 603. The lower courts in this case apparently read *Matsushita* to allow weighing of evidence on summary judgment.

The circuits are in disarray on this issue. Most circuits agree that evidence should not be weighed on summary judgment. *E.g., City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 647 (10th Cir. 1992); *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992); *Lang v. Retirement Living Publishing Co., Inc.*, 949 F.2d 576, 580 (2d Cir. 1991); *Ryder Int'l Corp. v. First American Nat'l Bank*, 943 F.2d 1521, 1523 (11th Cir. 1991); *Orthopedic & Sports Injury Clinic v. Wang Laboratories, Inc.*, 922 F.2d 220, 223 (5th Cir. 1991); *Perez v.*

Curcio, 841 F.2d 255, 258 (9th Cir. 1988); *Wilson v. Myers*, 823 F.2d 253, 256 (8th Cir. 1987). Some circuits explicitly or implicitly endorse weighing of evidence. *E.g., Mesnick v. General Elec. Co.*, 950 F.2d 816, 825 (1st Cir. 1991); *Country Floors, Inc. v. Partnership*, 930 F.2d 1056, 1061-62 (3d Cir. 1991); *Pyramid Securities Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1116 (D.C. Cir. 1991); *Palucki v. Sears, Roebuck & Co.*, 879 F.2d 1568, 1573 (7th Cir. 1989).

2. Erroneous Weighing of Evidence in This Case

Employers Reinsurance did not foreclose any of the facts and inferences that the Lifetime Partner Class raised, and that were to be considered in the light most favorable to the Lifetime Partner class. Instead, Employers Reinsurance relied on excluding as many of the affidavits as possible, and on weighing the rest of the forecast evidence.

The courts below effectively weighed the evidence that remained, after improperly excluding the affidavits at the summary judgment stage. As the appellate court said, "we consider first whether the language in question is ambiguous and then whether that language, on its own and in the context of the policy, includes coverage for fraudulent misstatements." Slip op. at 4. In doing so, the court discounted the intrinsic evidence offered by the PTL Lifetime Partner Class, or in some cases incorrectly categorized it as extrinsic, while refusing to consider the extrinsic evidence even to show the existence of ambiguity, and the circumstances of entering the policy, and ERC's and industry practices (as all contract and insurance treatises, and all relevant North Carolina cases, require as discussed in 21-25 and 27-30 *infra*).

Thus, the court below weighed and found wanting (or ignored) all the *intrinsic evidence* (with no light favoring the nonmoving party or the insured), which was summarized at 3-4 *supra*.

The court below *miscategorized some of that intrinsic evidence* as extrinsic, and refused to consider it, such as the most critical piece of evidence (the replacement of the proposed version of the policy that had a clear negligence restriction and fraud exclusion, with the final version of the Multimedia Policy that lacked either, for a 50% premium increase, slip op. at 5[7]), and all the deposition admissions of ERC agents. The court also *excluded the affidavits of insurance experts*, despite the clear admissibility of industry practice (29-30 *supra*). And the court below erroneously refused to consider any *extrinsic evidence* to identify latent ambiguity, to learn circumstances of entering the policy, or ERC and industry practice (4-5 *supra*).

The lower court's approach failed to follow the admonition that "Rule 56 must be construed with due regard . . . for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury . . . ." *Celotex Corp. v. Catrett*, 477 U.S. at 327.

C. CONTRARY TO THIS COURT'S REJECTION IN CELOTEX OF THE ARGUMENT THAT "THE NONMOVING PARTY MUST PRODUCE EVIDENCE IN A FORM THAT WOULD BE ADMISSIBLE AT TRIAL," THE COURT BELOW EXCLUDED AND IGNORED EVIDENCE THAT IT FOUND INADMISSIBLE (MISTAKENLY), AND THEREBY EXCLUDED AND IGNORED AFFIDAVITS OF EXPERTS AND AFFIDAVITS OFFERING INSURER DOCUMENTS THAT DEMONSTRATE GENUINE ISSUES OF MATERIAL FACT, FOLLOWING INCONSISTENT LANGUAGE IN ANDERSON AND MATSUSHITA, WHICH HAS BECOME A POINT OF CONFUSION IN THE CIRCUITS

The court below also erred in ignoring evidence at the summary

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[7]The proposed version of the policy was wrongly excluded by the district court as untimely filed, along with the Marsh & McLennan memorandum, even though they were wrongfully withheld by ERC, but the appellate court did not rely on that exclusion. We challenge that exclusion.

judgment level that it found inadmissible, even though it forecast admissible testimony. (That evidence was in fact admissible, 21-).

Celotex expressly recognized that evidence could meet Rule 56 requirements even though it was inadmissible at trial:

> We do *not mean that the nonmoving party must produce evidence in a form that would be admissible at trial* in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves . . . .

477 U.S. at 324. *Accord,* 477 U.S. at 333 (Brennan, J., dissenting, with Burger, C.J. and Blackmun, J.).

However, in *Matsushita*, the Court seemed to approve the lower courts' exclusions of evidence that apparently fell within the response devices expressly listed in Rule 56. While the Court expressly excluded "[t]hese evidentiary rulings" from the grant of certiorari, 475 U.S. at 580, it noted without criticism that "the District Court found the bulk of the evidence on which Zenith and NUE relied inadmissible," and that the "Court of Appeals . . . began by examining the District Court's evidentiary rulings, and determined that much [but not all] of the evidence excluded by the District Court was in fact *admissible*." *Id.*

The Lifetime Partners' response to ERC's summary judgment motion consisted of five affidavits by expert witnesses, seven depositions by ERC officials and agents, and two affidavits offering ERC documents. These materials conformed precisely to the response devices expressly in Rule 56, and were excluded. They actually were admissible as showing industry practice and as admissions.

II. THE PANEL DECISION CONFLICTED WITH DECISIONS OF THIS CIRCUIT AND THE SUPREME COURT, AND OVERLOOKED MATERIAL NORTH CAROLINA LAW, REQUIRING POLICY CONSTRUCTION TO GIVE

SIGNIFICANCE TO EACH WORD, NECESSITATING EXTRINSIC EVIDENCE TO DETERMINE IF LATENT AMBIGUITY EXISTS, AND ALLOWING EXTRINSIC EVIDENCE TO SHOW CIRCUMSTANCES OF ENTERING THE POLICY AND INSURER PRACTICE

A. "SIGNIFICANCE MUST BE GIVEN TO EACH WORD" IN AN INSURANCE POLICY, AND FOLLOWING THAT RULE SHOWS THAT THE DISPUTED LANGUAGE COVERS NON-NEGLIGENT "MISSTATEMENT OR MISLEADING STATEMENT" OR IS AMBIGUOUS

1. Uniform Decisions Require "Giving Significance to Each Word"

The general rule, stated by this Court, as well as treatises[8] and North Carolina courts,[9] is that each policy clause must be given "independent significance":

> [I]t is not intended to render meaningless the general words. Therefore, *where the particular words exhaust the class, the general words must be construed as embracing something outside of that class.* If the particular words exhaust the genus, . . . we must give the general words a meaning outside of the class indicated by the particular words, or we must say that they are meaningless, and there by sacrifice the general to preserve the particular words.

United States v. Mescall, 215 U.S. 26, 31-32 (1909). Thus, the "particular words" "negligent error" exhaust the class of negligent misstatements and negligent misleading statement, and so

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[8] 13 *Appleman's Insurance Law and Practice* § 7386, at 37 (Supp. 1991) ("But a contract should be interpreted to give significance to each word or phrase according to its importance in the context of the contract and when the specific words exhaust the class described, general words which follow should be construed to embrace something outside the class."); *e.g.*, M.B.A.F.B. Federal Credit Union v. Cumis Ins. Society, 681 F.2d 930, 932 (4th Cir. 1982).

[9] *E.g.*, Silvers v. Horace Mann Ins. Co., 324 N.C. 289, 378 S.E.2d 21, 25 (1989) ("every word and every provision is to be given effect"); Williams v. Nationwide Mutual Ins. Co., 269 N.C. 235, 152 S.E.2d 102, 107 (1967) (same).

the "general words" "misstatement and misleading statement" similarly "must be construed as embracing something outside of that class" of "negligent error." To do otherwise "renders meaningless" those general words, something that North Carolina law[10] and insurance treatises[11] clearly forbid.

2. Failure "To Give Significance to Each Word" Rendered Meaningless the Words "Misstatement or Misleading Statement" by Limiting Them to Types of "Negligent" Error, and "Giving Significance to Each Word" Proves Coverage or at Least Ambiguity

The panel conflicted with that rule by failing to give independent significance to the words covering "misstatement or misleading statement." In this policy, the coverage of "negligent error" necessarily includes negligent misstatements and negligent misleading statements. ERC admitted that by using the language "misstatement or misleading statement as a result of negligent error or omission" in the rejected draft of this policy. (A.435-36.) Thus, only by understanding "negligent" to modify "error" alone can any independent significance be given to the words "misstatement and misleading statement" in the coverage language. When the panel understood "negligent" to modify "misstatement or misleading statement," it failed to give independent significance to the phrase and rendered it meaningless.

ERC effectively acknowledged this when it eliminated the clear negligence language and deleted the clear fraud exclusion in exchange for a 50% premium increase. (*Compare* A.436 with A.1, 435.) ERC also acknowledged this interpretation when it could

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[10] *E.g.*, Silvers v. Horace Mann Ins. Co., 324 N.C. 289, 378 S.E.2d 21, 25 (1989) ("every word and every provision is to be given effect"); Williams v. Nationwide Mutual Ins. Co., 269 N.C. 235, 152 S.E.2d 102, 107 (1967) (same).

[11] *E.g.*, 13 *Appleman's Insurance Law and Practice* § 7386, at 37 (Supp. 1991); M.B.F.A.B. Federal Credit Union v. Cumis Ins. Society, 681 F.2d 930, 932 (4th Cir. 1982).

give no reason, under its interpretation, why it needed a criminal exclusion in this policy, or a fraud exclusion in the proposed version, in every other "misstatement and misleading statement" policy, and in every other "negligent error or omission" policy.[12] If "negligent" modified "misstatement or misleading statement," there was no need to exclude "crimes" here or "fraud" there.

3. The Reading of "Misstatement or Misleading Statement" To Include Non-Negligent Statements Is Consistent with the Other Internal Evidence in the Policy

Other language in the policy supports the reading of the policy resulting from giving "misstatement or misleading statement" independent significance. The panel overlooked this language and other important facts in concluding that "there is no dispute regarding the facts." (Slip op. at 4.) These disputed facts include the following five lines of internal evidence, besides the expert affidavits and ERC admissions and five lines of extrinsic evidence (21-30), and all show coverage or at least ambiguity. In fact, every policy-related document and affidavit in the record supports the Lifetime Partners' reading of the policy, and opposes ERC's.

a. The Deletion of the Clear Negligence Language and of the Clear Fraud Exclusion, in Exchange for Increasing the Premium 50%, Shows that "Negligent" Only Modifies "Error" and Not "Misstatement or Misleading Statement"

The proposed version of the policy (the Broadcasters Broad Form Policy) had a clear negligence restriction and clear fraud exclusion, and *those provisions were deleted* in the final policy (the Multimedia Policy) after a 50% increase in the premium. (A.1047, A.2-3.) In other words, the Multimedia Liability Policy made exactly the two changes that would be expected if its coverage was meant to extend beyond negligence to fraud:

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[12] *E.g.*, A.269-71, 198-200, 225, 289, 293, 315-16.

Broadcasters Broad Form	*Final Multimedia Policy*
Coverage: "misstatement or misleading statement as a result of negligent error or omission"	**Coverage:** "negligent error, omission, misstatement or misleading statement"
Exclusion: "any judicially determined dishonest, fraudulent or criminal act"	**Exclusion:** "criminal fines or penalties"

As Appleman states, "the fact that the insurer had available common alternative usages of limited coverage clauses and an exclusionary clause, where only one alternative was employed, is a clearly permissible aid to construction."[13]

The *premium was increased by 50%* when the Broadcaster's Broad Form was changed to the Multimedia Policy. (A.436 ($28,125), A.1 ($42,187).) The "necessary inference" from the "substantial additional premium" is "that the parties intended that the policy, as amended, would provide substantial additional protection." *York Industrial Center, Inc. v. Michigan Mutual Liability Co.*, 271 N.C. 158, 155 S.E.2d 501, 505 (1967). By contrast, every court decision that the panel cited or referred to (from ERC's brief), involving a "negligent error or omission" policy, had an *express fraud exclusion*.[14]

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[13]13 *Appleman's Insurance Law and Practice* § 7387, at 179. *E.g.*, Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co., 276 N.C. 348, 172 S.E.2d 518, 525 (1970) (later-used "'standard provision' of such policies" allowed, in case relied on by ERC); West American Ins. Co. v. Tufco Flooring East, Inc., 409 S.E.2d 692, 699 (N.C.App. 1991) ("the insurance industry amended the pollution exclusion clause"); Calvert Fire Insurance Co. v. Yosemite Insurance Co., 573 F.Supp. 27, 29, 30 n.2 (E.D.N.C. 1983) (other policy of same insurer, as extrinsic evidence exception).

[14]*E.g.*, United States Fidelity & Guaranty Co. v. Fireman's Fund Insurance Co., 896 F. 200, 201 (6th Cir. 1990) (any "dishonest, fraudulent, or malicious act"); Golf Course Sup'ts Ass'n v. Underwriters at Lloyd's, 761 F.Supp. 1485, 1490 (D.Kan. 1991) ("policy expressly excludes coverage . . . dishonesty").

[15]Reply Br. of Appellants at 4-11, Teague v. Employers Reinsurance Corp., No. 91-2299 (4th Cir. filed Nov. 18, 1991).

b. The Other Clauses in the Multimedia Policy Where the First Adjective Only Modified the Next Noun and Not the String of Nouns Show that "Negligent" Only Modifies "Error" and Not "Misstatement or Misleading Statement"

The panel was mistaken in ruling "that the adjective preceding a series of nouns [necessarily] modifies every noun in the series," and in finding its construction to be "in accordance with grammatical rules and popular usage." (Slip op. at 5, 4.) First, the *policy itself has a pattern* of adjectives that only modify the next noun and not the rest of the series, such as the following:

> "court costs, interest upon judgments, investigation, adjustment, and legal expenses paid by the Insured" [IV(b)]
> "under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law" [II(a)(4)]
> "prejudgment interest and plaintiff's costs included in the judgment" [IV(b)]

Second, the only "grammatical rules" that ERC was able to show was an arcane inapplicable rule in one grammar book. *No such grammatical rule* was given in the fifteen grammar books that the Lifetime Partner Class cited, or in any ERC manual or insurance industry document, and the rule had been cited by only one court in American history (in 1934).[15] Third, ERC's general counsel and claims director *denied that ERC was relying on any rules of interpretation* in denying coverage. (A.191, 287.)

c. The Use of a Crime Exclusion, and Deletion of a Civil Fraud Exclusion, Support Coverage of Civilly Fraudulent "Misstatement and Misleading Statement"

ERC's selection of a criminal exclusion but not a fraud exclusion plainly means that ERC chose to exclude crimes but not civil fraud. Because even the clear negligence language of other policies required an express fraud exclusion to avoid coverage of fraudulent "misstatement or misleading statement," the unrestricted (or at best ambiguous) coverage language of the Multimedia Lia-

bility Policy required an express fraud exclusion to avoid coverage of fraudulent "misstatement or misleading statement." ERC "could have expressed in plain words the exception for which it now contends," as in a case of this Court involving the insurer's failure to exclude "anything relative to fraud." *Stroehmann v. Mutual Life Ins. Co.*, 300 U.S. 435, 438-39 (1937).

d. The Coverage of Punitive Damages, Which Result Only from Fraudulent Statements and Not from Negligent Ones, Shows Coverage of Civilly Fraudulent "Misstatement and Misleading Statement"

There is no question that the Multimedia Liability Policy covered punitive damages in North Carolina. (A.417, 424, 418.) Coverage of punitive damages, without an express exclusion, entails coverage of the grounds for punitive damages, including civil fraud.

e. The Coverage of Every Other Intentional and Fraudulent Tort, and of Every Included Type of Fraudulent Statement, Shows Coverage of Fraudulent "Misstatement and Misleading Statement"

The context of the "misstatement or misleading statement" language was that the policy covered virtually every other intentional tort against property, and every other such tort could be committed by fraudulent "misstatement or misleading statement." The policy had a very leaky stopper if all "misstatements or misleading statements" were included in coverages (1)-(6) and (8)-(10), but only "negligent" ones were included in coverage (7).

B. EXTRINSIC EVIDENCE MUST BE CONSIDERED TO DECIDE WHETHER THERE IS LATENT AMBIGUITY

1. Uniform Authority Allows Extrinsic Evidence To Show Latent Ambiguity, and Recognizes that It Is Indispensable

Until the decision under appeal, all circuits agreed that extrinsic evidence can and must be used to *identify* latent ambiguities, and extrinsic evidence may and must be considered before a finding of latent ambiguity can be made, so the extrinsic evi-

dence rule is not the same for latent ambiguity as for patent ambiguity.[16] In rare unanimity, the treatises agreed as well that "[e]ven though words seem on their face to have only a single possible meaning, other meanings often appear when the circumstances are disclosed".[17]

§ 79:143. Explanation of ambiguities.

A *latent ambiguity* exists where, on the face of a policy, there is no doubt or uncertainty, but *by proof aliun-*

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[16]*E.g.*, United States ex rel. West Chester Electric v. Sentry Ins., 774 F.2d 80, 84 (4th Cir. 1985) ("An ambiguity arises when the payment bond is considered together with the subcontract."); Sherman v. Mutual Benefit Life Ins. Co., 633 F.2d 782, 784 (9th Cir. 1980) (latent ambiguity may be shown by extrinsic evidence, even if the policy "appears to the court to be plain and unambiguous"); Pan Am World Airways, Inc. v. Aetna Casualty & Surety Co., 505 F.2d 989 (2d Cir. 1974) (ambiguity shown by extrinsic evidence of insurer's adoption of new clauses to deal with similar losses, showing that prior exclusions were ambiguous); University City v. Home Fire & Marine Ins. Co., 114 F.2d 288, 295 (8th Cir. 1940) ("a latent ambiguity is one developed by extrinsic evidence"); Queen Ins. Co. v. Meyer Milling Co., 43 F.2d 885, 887 (8th Cir. 1930) ("To discover latent ambiguity it is, of course, necessary to go outside the instrument"); St. Paul Fire & Marine Ins. Co. v. Balfour, 168 F. 212, 216 (9th Cir. 1909) ("a latent ambiguity . . . raised by the parol evidence"); Kuhn v. Chesapeake & O.Ry., 118 F.2d 400, 404 (4th Cir. 1941) (apparently unambiguous deed placing border at the river shown latently ambiguous by extrinsic evidence that the river split around an island; that "latent ambiguity" is "resolved by the jury in the light of the parol evidence"); Pacific Gas & Electric Co. v. G.W.Thomas Drayage & Rigging Co., 69 Cal.2d 33, 37, 442 P.2d 641, 644 (1968) (per Chief Justice Traynor) ("The test . . . is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.").

[17]2 *Restatement of Contracts 2d* § 214 Comment b (1981). *E.g.*, 2 *Restatement of Contracts 2d* §§ 213 (parol evidence excluded only if inconsistent), 212 & Comment b (extrinsic evidence generally admissible) (1981); 3 *Corbin on Contracts* § 542, at 108-10 (1960); 30 Am.Jur.2d *Evidence* § 1073, at 218 (latent ambiguity "is shown to exist for the first time by matter outside the writing").

> *de the language is shown* to be alike applicable to two or more persons or objects.
>
> **Parol evidence is admissible to explain a latent ambiguity** but not to explain a patent ambiguity, which is one arising upon the face of the instrument . . . .
>
> Where either the general language or particular words or phrases used in a contract of insurance are ambiguous, that is doubtful as to meaning, or, *in the light of other facts*, reasonably capable of having more than one meaning so that the one applicable to the contract in question cannot be ascertained without outside aid, *extrinsic evidence may be introduced to explain such ambiguity.*
>
> Evidence of actual intent is admissible if *a latent defect is disclosed by the surrounding circumstances*, even in the absence of a patent ambiguity.[18]

North Carolina courts, without a single exception, joined in this unanimous authority that "[a] *latent ambiguity* may arise where the words of a written agreement are plain, but by reason of *extraneous facts* the definite and certain application of those words is found impracticable."[19] "A patent ambiguity cannot be explained by parol, a latent ambiguity can."[20]

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[18]*Couch Cyclopedia of Insurance Law* §§ 79:141-47, at 116-20, 124.

[19]Miller v. Green, 183 N.C. 652, 112 S.E. 417, 418 (1922). *E.g.*, Calvert Fire Insurance Co. v. Yosemite Insurance Co., 573 F.Supp. 27, 29, 30 n.2 (E.D.N.C. 1983) (insurance term was determined to be "not ambiguous," by use of the extrinsic evidence of a separate insurance policy, and that use of a separate policy "where one of the parties is the same" was treated as an exception to the rule excluding such extrinsic evidence.); Redd v. Taylor, 270 N.C. 14, 153 S.E.2d 761, 766-67 (1967) (will leaving gift to "World Missions" clear on its face but shown latently ambiguous by extrinsic evidence of two groups with that name).

[20]*E.g.*, Perry v. Morgan, 219 N.C. 377, 14 S.E.2d 46, 49 (1941). *Accord*, Thompson v. Umberger, 221 N.C. 178, 19 S.E.2d 484, 485 (1942); Green v. Harshaw, 187 N.C. 213, 121 S.E. 456, 458 (1924); Maurice v. Hatterasman Motel Corp., 38 N.C.App. 588, 248 S.E.2d 430, 432 (1978); *Couch Cyclopedia of Insurance Law* §§ 79:143, 147, at 116, 124 ("Parol evidence is admissible to explain a latent ambiguity but not to explain a patent ambiguity . . . . A latent ambiguity as to coverage permits the admission of extrinsic evidence to discover the real intent of the contracting

The appellate panel fractured the uniformity of this rule in holding that "unambiguous policy language is to be construed without resort to extrinsic evidence" (slip op. at 5), even for the purpose of identifying latent ambiguity as precedent allows. The panel thereby confused patent ambiguity (for which the rule is correctly stated) with latent ambiguity (which comes under the different rule, and which could never be discovered without extrinsic evidence[21]). That exclusion removed powerful evidence that proved coverage or at least ambiguity.

Second, the law is equally uniform that *explanation* of "the meaning of [a] writing, whether or not integrated," may be assisted by extrinsic evidence, without coming under the extrinsic evidence rule so long as it does not vary the terms of the writing. 2 *Restatement of Contracts 2d* § 214(c) (1981). The other circuits[22] and treatises[23] agree. Contrary to

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parties."); 4 *Williston on Contracts* § 627, at 897; 30 Am.Jur.2d *Evidence* § 1073 (1967 & Supp. 1991); 32A C.J.S. *Evidence* § 961(b)-(d) (1964 & Supp. 1991).

[21]"Before holding that the words of a written contract are so 'plain and clear' that extrinsic evidence in aid of interpretation is not admissible, the court . . . is substituting its own linguistic education and experience for that of the contracting parties." 3 *Corbin on Contracts* § 542, at 111 (1960). "Even though words seem on their face to have only a single possible meaning, other meanings often appear when the circumstances are disclosed." 3 *Restatement of Contracts 2d* § 214 Comment b.

[22]*E.g.*, Sherman v. Mutual Benefit Life Ins. Co., 633 F.2d 782, 785 (9th Cir. 1980) (policy dispute "'must be resolved by consideration of relevant extrinsic evidence that explains but does not flatly contradict the writing'"); Pan American World Airways, Inc. v. Aetna Casualty & Surety Co., 505 F.2d 989, 1000 n.10 (2d Cir. 1974) (allowing "proper weight to the fact that the all risk insurers adopted new clauses"); Hartford Steam Boiler Ins. Co. v. Schwartzman Packing Co., 423 F.2d 1170, 1173 (10th Cir. 1970) ("testimony of the insurance broker who was agent for Hartford, two prior insurance policies of Hartford issued to Schwartzman, a letter from Hartford to its agents describing

this uniform rule of other circuits, the court below refused to allow extrinsic evidence to explain the meaning of the Multimedia Policy.[24]

Finally, the *modern rule is that extrinsic evidence is considered* even in the absence of latent or patent ambiguity.[25] North Carolina appears to have adopted this rule.[26]

2. The Contrary Rule Conflicts with Insurance Precedents Resolving Latent as Well as Patent Ambiguity for the Insured

The Fourth Circuit approach, refusing to consider latent ambiguity as identified by extrinsic evidence, conflicts with this Court's "settled" rule "that, in case of ambiguity, that construc-

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policy changes and a letter from Hartford to Schwartzman" constituted extrinsic "evidence [that] was relevant and admissible"); National Surety Corp. v. Musgrove, 310 F.2d 256, 260 (5th Cir. 1962) (agent testimony about meaning); Aetna Life Ins. Co. v. Phillips, 69 F.2d 901, 904 (10th Cir. 1934) ("a latent ambiguity may be explained by extrinsic evidence"); Queen Ins. Co. v. Meyer Milling Co., 43 F.2d 885, 888 (8th Cir. 1930) (latent ambiguity resolved by agent testimony showing parties' intent); Scottish Union & National Ins. Co. v. McKone, 227 F. 813, 815 (8th Cir. 1915) (same showing correct property description); St. Paul Fire & Marine Ins. Co. v. Balfour, 168 F. 212, 216 (9th Cir. 1909) ("'it is so well established as to be beyond all possible dispute that parol or other extrinsic evidence is always admissible to explain a latent ambiguity'").

[23]*E.g.*, Couch Cyclopedia of Insurance Law § 79:143, at 116-20 ("Parol evidence is admissible to explain a latent ambiguity"); 32A C.J.S. *Evidence* § 961(b), at 428 (1964 & Supp. 1991) ("It is generally held that parol or other extrinsic evidence is always admissible to explain a latent ambiguity.").

[24]*See* note *supra*.

[25]2 *Restatement of Contracts 2d* § 212, Comment b, at 126 (1981) ("not limited to cases where it is determined that the language used is ambiguous"); *id.* § 213 (parol evidence excluded only if inconsistent); 3 *Corbin on Contracts* § 542, at 108-10 (1960).

[26]West American Insurance Co. v. Tufco Flooring East, Inc., 409 S.E.2d 692, 696-97 (N.C.App. 1991) (relying on extrinsic evidence but not requiring ambiguity, because ambiguity was an entirely separate "second reason" for decision, *id.* at 697).

tion of the policy will be adopted which is *most favorable to the insured*," even if not "free from reasonable doubt."[27] The extrinsic evidence rule would exclude the evidence when it is useful (before latent ambiguity is found), and would admit extrinsic evidence only when it is useless (once ambiguity is found, and the ambiguity is automatically resolved in the insured's favor).

3. The Extrinsic Evidence Did Show and Explain Latent Ambiguity and the ERC Admissions Were Not Extrinsic At All

Latent ambiguity was *shown* by all of the extrinsic evidence that the Fourth Circuit refused to consider (4-5 *supra*), such as ERC's alternative policy language (initially present then deleted here) that ERC deemed necessary to limit to negligence every other of its policies covering "misstatement and misleading statement," and ERC's express fraud exclusion (also initially present and then deleted here) that ERC similarly deemed necessary.[28]

Further, ERC's *admissions were not extrinsic evidence* at all, but certainly showed latent ambiguity, and at a minimum create a genuine issue of material fact. Two agents admitted that the disputed language covers negligent or non-negligent "misstatement or misleading statement" (A.056-57, 068), two ERC officials and an agent admitted the possible ambiguity of the policy language (A.163, 168, 165; A.143-45; A.306), and one agent even admitted the possible coverage of the Teague class action (A.1051,

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[27]Mutual Life Ins. Co. v. Hurni Packing Co., 263 U.S. 167, 174-75 (1923). *Accord*, Continental Casualty Co. v. Burton, 795 F.2d 1187, 1190 (4th Cir. 1986); C.Douglas Wilson & Co. v. INA, 590 F.2d 1275, 1288 (4th Cir. 1979).

[28]Stroehmann v. Mutual Life Ins. Co., 300 U.S. 435, 438-39 (1937) (case involving the insurer's failure to exclude "anything relative to fraud"). *Accord*, Equitable Life Assurance Society v. Deem, 91 F.2d 569, 574 (4th Cir. 1937) ("If it had been the intention . . . it would have been easy enough to use language making that intention clear").

1053). Those agents' admissions are ERC's admissions,[29] because "[e]very agent . . . is regarded as representing the insurer and not the insured". N.C.G.S. § 58-33-20(a).[30] Agents' admissions are binding without regard to rules governing extrinsic evidence.[31] If there were any dispute whether these were ERC's agents, that itself would be a factual issue.[32]

C. EXTRINSIC EVIDENCE MAY BE USED TO SHOW THE CIRCUMSTANCES OF ENTERING THE POLICY, ERC'S PRACTICES, AND INDUSTRY PRACTICES, WITHOUT ANY FINDING OF AMBIGUITY

1. Circumstances of Entering the Policy May Be Considered without Any Ambiguity

First, the extrinsic evidence rule does not apply to the circumstances of entering the policy, as this Court has recognized:

> There can be no doubt whatever of the general proposition that, in the interpretation of any particular clause of a contract, the court . . . may also consider . . . the circumstances under which it was signed."[33]

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[29] *E.g.*, 44 Am.Jur.2d *Insurance* § 1969, at 973 (1982) (agents' admissions generally) (citing cases); 19 *Couch on Insurance* § 79:197, at 167 (same).

[30] *Accord*, Stipcich v. Metropolitan Life Ins. Co., 277 U.S. 311, 320-21 (1928); 3 *Couch Cyclopedia of Insurance Law* § 26.1, at 488. "It is well settled in this state that the knowledge of the local agent of an insurance company is in law the knowledge of the principal," and this is true "though the policy contains a stipulation to the contrary." Williams v. Greensboro Fire Ins. Co., 289 N.C. 765, 185 S.E. 21, 23 (1936). *Accord*, Commercial Casualty Ins. Co. v. Lawhead, 62 F.2d 929, 930 (4th Cir. 1933), *cert. denied*, 289 U.S. 731 (1934).

[31] *E.g.*, Fox v. Volunteer State Life Ins. Co., 186 N.C. 761, 119 S.E. 172, 172 (1923); King v. Travelers Inc. Co., 84 N.M. 550, 505 P.2d 1226 (1973); *see* Orren v. Phoenix Ins. Co., 288 Minn. 225, 179 N.W.2d 166, 169 (1970); U.S.Fidelity & Guaranty Co. v. Baugh, 257 N.E.2d 699, 712-13 (Ind. App. 1970).

[32] 22 *Appleman's Insurance Law and Practice* § 12854, at 26-28. *Accord*, Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979).

[33] Chicago, Rock Island & P.R. v. Denver & Rio Grande R.,

The treatises, such as the *Restatement*, agree:[34]

> *Plain meaning and extrinsic evidence.* It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. Accordingly, the rule stated in Subsection (1) [considering circumstances] is *not limited to cases where it is determined that the language used is ambiguous*. Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation . . ., preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties. . . .[35]

North Carolina law concurs without exception.[36]

The principle extends to the insurer's own practices, under this Court's decisions and insurance treatises[37] and North

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143 U.S. 596, 609 (1892).

[34]*Couch Cyclopedia of Insurance Law* § 79:143 ("§ 79:142. Custom and course of dealings. Evidence of previous dealings with the insured, and the insurer's general manner of doing business through agents, is admissible . . . . Usage may be proved by parol . . . ."); 2 *Restatement of Contracts 2d* § 214(c) (1981) ("Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish . . . the meaning of the writing, whether or not integrated."); 4 *Williston on Contract* § 629, at 918-19 (1961) (same); 30 Am.Jur.2d *Evidence* § 1071, at 216 (1967 & Supp. 1991) ("Construing a contract of debatable meaning by resort to antecedent negotiations for light as to the meaning of the words used is never a violation of the parol evidence rule.")

[35]2 *Restatement of Contracts 2d* § 212, Comment b, at 126 (1981).

[36]*E.g.*,, Miller v. Green, 183 N.C. 652, 112 S.E. 417, 417-18 (1922) ("if there is latent ambiguity . . . preliminary negotiations and surrounding circumstances may be considered for the purpose of determining what the parties intended"); Vestal v. Vestal, 271 S.E.2d 306, 309 (1980) (same).

[37]*E.g.*, Brooklyn Life Ins. Co. v. Dutcher, 95 U.S. 269, 273 (1877) (even though no ambiguity was found, "fact must not be overlooked, that the Company . . . always issued paid-up policies upon the basis of the full amount of premiums paid"); *Couch Cyclopedia of Insurance Law* § 79:142 ("Evidence of previous dealings with the insured, and the insurer's general manner of

Carolina law.[38]

The panel should have allowed consideration of the fact that "ERC intended to cover fraud because it deleted from the PTL policy a fraud exclusion it normally includes" (slip op. at 5), ERC's deletion of the clear negligence restriction, ERC's uniform use of a clear negligence restriction and a clear fraud exclusion where "misstatement or misleading statement" were meant to be limited, ERC's description of "expanded coverage" for the "sizable premium" increase of 50%, ERC's official brochure promising "broader coverages" and describing "misstatement or misleading statement" coverage without a negligence restriction, ERC's agent's admission of potential coverage for this suit, and ERC's other agents' admissions of coverage of non-negligent "misstatement or misleading statement"[39].

2. Industry Practices May Be Considered without Any Ambiguity

Second, the extrinsic evidence rule was mistakenly applied to industry practices:

> This Court, moreover, has long emphasized that in interpret-

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doing business through agents, is admissible"); Pan American World Airways, Inc. v. Aetna Cas. & Surety Co., 505 F.2d 989, 1000 n.10 (2d Cir. 1974) ("new clauses").

[38]*E.g.*, Miller v. Green, 183 N.C. 652, 112 S.E. 417, 417-18 (1922) ("if there is latent ambiguity . . . preliminary negotiations and surrounding circumstances may be considered for the purpose of determining what the parties intended"). *Accord*, Calvert Fire Insurance Co. v. Yosemite Insurance Co., 573 F.Supp. 27, 29, 30 n.2 (E.D.N.C. 1983) (other policy of same insurer was expressly allowed as exception to extrinsic evidence rule); Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co., 276 N.C. 348, 172 S.E.2d 518, 525 (1970) ("'standard provision' of such policies" that was later used); West American Insurance Co. v. Tufco Flooring East, Inc., 409 S.E.2d 692, 696-97 (N.C.App. 1991) (insurer flyer, industry annotations, and experts' analysis allowed, and did not require a finding of ambiguity to admit that extrinsic evidence).

[39]A.1 & 435-36; 327,337,348;325;413,401;1051;056-57,068.

> ing insurance contracts, reference should be made to considerations of business and insurance practices.

Standard Oil Co. v. United States, 340 U.S. 54, 60 (1950). Treatises[40] and North Carolina courts[41] agree.

The panel should have allowed consideration of, rather than excluding, "an expert's opinion [actually four experts'] that the phrase was intended to cover intentional misstatements" under industry and ERC practice. (Slip op. at 5; A.028, 030, 033-34, 037-39, 042.)

3. The Extrinsic Evidence Was Admissible To Show the Circumstances of Entering the Policy, ERC Practices, and Industry Practices

All of the excluded evidence, which the lower courts deemed to be extrinsic, showed the circumstances of entering the Multimedia Policy, and also showed ERC's practices. *See* 4-5 *supra*. That evidence was ERC's own documents, not the extrinsic evidence of third parties. All the affidavits showed industry practice.

CONCLUSION

Thus, the appellate panel conflicted with this Court's decisions on summary judgment and insurance construction, and should be reversed to allow the right to jury trial.

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[40] *E.g.*, Livingston & Gilchrist v. Maryland Ins. Co., 11 U.S. 506, 539, 537 (1813) ("usage may be proved by parol," and it was error to "exclude entirely from the consideration of the jury the regular usage of trade."); 13 *Appleman's Insurance Law and Practice* § 7388, at 187 ("business and insurance practices").

[41] *E.g.*, Glens Falls Indemnity Co. v. Apple & Bond Co., 69 F.2d 695, 698 (4th Cir. 1934) ("custom of casualty insurance companies"); Owens v. Reserve Loan Life Ins. Co., 206 N.C. 864, 175 S.E.203, 205 (1934) ("parol evidence is admissible to explain technical terms"); Stonewall Ins. Co. v. Fortress Reinsurers Managers, Inc., 83 N.C.App. 263, 350 S.E.2d 131, 134 (1986) (even though the disputed policy term was "not ambiguous," nonexpert and expert "parol evidence as to the meaning of the term 'for its own account' was necessary to determine the usual and ordinary meaning of that term in the reinsurance industry").

Respectfully submitted,

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APPENDIX

I. FOURTH CIRCUIT OPINION
II. FOURTH CIRCUIT DENIAL OF REHEARING
III. DISTRICT COURT OPINION
IV. DISTRICT COURT RULE 54(b) ORDER
V. STATUTES

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

EMPLOYERS REINSURANCE CORPORATION,

Plaintiff-Appellee,

v.

JOSEPH W. TEAGUE; HELEN B. TEAGUE; STEVEN ALLEN BARKER; RITA STRAHOWSKI; SWANNEE BECK, Lifetime Partners of PTL, as representatives of a nationwide class consisting of 150,290 Lifetime Partners and of 27,839 persons who have partially paid for Lifetime Partnerships,

Defendants-Appellants,

and

JAMES O. BAKKER; DAVID A. TAGGART; AIMEE CORTESE,

Defendants.

No. 91-2299

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte.
Robert D. Potter, District Judge.
(CA-90-129-C-C-P)

Argued: May 7, 1992

Decided: August 14, 1992

Before WIDENER and PHILLIPS, Circuit Judges, and KAUFMAN, Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Wendell R. Bird, BIRD & ASSOCIATES, Atlanta, Georgia, for Appellants. Michael Terry Medford, MANNING, FULTON & SKINNER, P.A., Raleigh, North Carolina, for Appellee. **ON BRIEF:** David J. Myers, BIRD & ASSOCIATES, Atlanta, Georgia; Thomas T. Anderson, Samuel F. Trussell, THOMAS T. ANDERSON & ASSOCIATES, Indio, California; Janathan P. Wallas, FERGUSON, STEIN, WATT, WALLAS, ADKINS & GRESHAM, Charlotte, North Carolina, for Appellants. Charles E. Nichols, Jr., MANNING, FULTON & SKINNER, P.A., Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Joseph Teague, on behalf of a class of "lifetime partners" and partial lifetime partners in the Praise The Lord organization (PTL), appeals a summary judgment order which concluded as a matter of law that PTL's libel and allied torts indemnity policy (policy), issued to PTL by Employers Reinsurance Corporation (ERC), does not cover fraudulent activities of PTL founder, Jim Bakker. Because we agree with the district court's conclusion that the policy language at issue was unambiguous and that the policy does not cover Bakker's intentional acts, we affirm.

I.

In 1987, PTL lifetime partners (including the Teague class) filed suit against Bakker and other PTL officials, alleging that Bakker had committed fraud in the lifetime partner program. The lifetime partners contributed to PTL in exchange for the right to stay in PTL accommodations for a certain number of nights each year. The partners sued when PTL could no longer provide the accommodations after its bankruptcy in 1987. They alleged that Bakker fraudulently oversold the lifetime partnerships and diverted PTL assets, knowing that PTL could not provide the promised accommodations. Bakker was convicted in 1989 of wire fraud, mail fraud and conspiracy for the same conduct. In January 1991, the lifetime partner class won a $129,747,618.00 civil judgment against Bakker for common law fraud.[1]

During the time of Bakker's fraudulent activities, PTL held an ERC insurance policy protecting PTL against liability resulting from libel, slander, invasion of privacy, copyright infringement, trespass in the acquisition or publication of a story, and other tortious activities. Section I(a)(7) of the policy covers liability arising from "negligent error, omission, misstatement or misleading statement." This language is at the heart of the instant dispute.

ERC filed this diversity action against Bakker in April of 1990 in the Western District of North Carolina. ERC sought a declaration that its insurance policy does not indemnify Bakker for claims by defrauded lifetime partners. The Teague class intervened as defendants, arguing that the policy covers indemnification for Bakker's fraudulent activities. The district court granted ERC's motion for summary judgment, holding that the policy language at issue was unambiguous and that it did not include coverage for Bakker's intentional misstatements. Teague's appeal followed.

II.

We review a summary judgment *de novo*. *Cohn v. Bond*, 953 F.2d 154, 157 (4th Cir. 1991). Summary judgment is proper where the

[1]Two other PTL officials, Aimee Cortese and David Taggert, were also defendants in the civil action, but the jury found for them on all claims.

pleadings, depositions, interrogatories and admissions on file, with any affidavits, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. Fed. R. Civ. Proc. 56(c). Since there is no dispute regarding the facts, and the matter is reduced to a narrow question of contract interpretation, we must decide only whether ERC is entitled to judgment as a matter of law under the policy. *Radiator Specialty Co. v. First State Ins. Co.*, 651 F. Supp. 439 (W.D.N.C. 1987), *aff'd*, 836 F.2d 193 (4th Cir. 1987).

Teague argues that in the phrase "negligent error, omission, misstatement or misleading statement," the adjective "negligent" modifies only "error," resulting in coverage for any type of misstatement, including fraudulent misstatements. Teague alternatively argues that the phrase is at least ambiguous and that the district court therefore erred in refusing to consider, as aids in construing the policy, a comparison of the PTL policy with other ERC media policies and expert testimony interpreting the language. This extrinsic evidence, Teague argues, supports the conclusion that the policy covers common law fraud. Although the two lines of argument are intimately tied, we consider first whether the language in question is ambiguous and then whether that language, on its own and in the context of the policy, includes coverage for fraudulent misstatements.

A.

Teague contends that the clause covering "negligent error, omission, misstatement or misleading statement" is at least ambiguous to the extent that it is not clear whether "negligent" modifies all four terms in the series. Teague argues that "negligent" modifies only error and that the policy thereby covers nonnegligent or intentional omissions, misstatements or misleading statements. The district court rejected this argument, finding that the clause is unambiguous and that, in accordance with grammatical rules and popular usage, the adjective "negligent" modifies every word in the series. We agree.

Under North Carolina law, which governs the resolution of this diversity matter, we can not find ambiguity merely on the basis of a difference of opinion between the parties on the interpretation of a policy provision. *Brown v. Lumbermens Mutual Casualty Co.*, 390

S.E.2d 150, 153 (N.C. 1990). Ambiguity is not established by party disagreement unless the parties' varying interpretations fairly and reasonably arise from the policy language. *Big B Transportation, Inc. v. United States Insurance Group*, 377 S.E.2d 278 (N.C. App. 1989). We believe Teague's interpretation of the clause is strained, and we agree with other courts which have held, construing comparable provisions, that the adjective preceding a series of nouns modifies every noun in the series. *See United States Fidelity & Guaranty Co. v. Fireman's Fund Insurance Co.*, 896 F.2d 200, 203 (6th Cir. 1990) (the only reasonable construction of "negligent act, error, or omission" is that the policy covers only negligent behavior); *Golf Course Superintendents Assn. v. Underwriter's at Lloyd's, London*, 761 F. Supp. 1485, 1490 (D. Kan. 1991) (in the phrase "negligent act, error, omission misstatement or misleading statement," "negligent" modifies every relevant item in the series). Teague points to only one case to the contrary. In *Aitchison v. Founders Ins. Co.*, 333 P.2d 178 (Cal. 1958), the court held that the phrase "negligent error, act, or omission" included coverage for errors which were the result of nonnegligent, honest mistakes. However, *Aitchison* alone does not create enough uncertainty regarding the meaning of the phrase to establish ambiguity. Even *Aitchison* did not interpret the clause to include intentional acts.

Under North Carolina law, which controls, unambiguous policy language is to be construed without resort to extrinsic evidence to "aid" in its interpretation. *Metric Constructors, Inc. v. Industrial Risk Insurers*, 401 S.E.2d 126, 128 (N. C. 1991). The district court therefore properly declined to consider Teague's proffers of extrinsic evidence, specifically, an expert's opinion that the phrase was intended to cover intentional misstatements and Teague's assertion that ERC intended to cover fraud because it deleted from the PTL policy a fraud exclusion it normally includes in media policies.

B.

We agree with the district court's conclusion that the unambiguous policy clause, taken on its own and in the context of the policy as a whole, does not cover intentional misstatements. Reading "negligent" as modifying every noun in the series of covered risks, "negligent errors, omissions, misstatements or misleading statements," inten-

tional misstatements simply are not included. This interpretation is explicitly supported by *Golf Course* and *Fireman's Fund*. It is implicitly supported by a prior decision of this court in *Western World Ins. Co. v. Harford Mutual Ins. Co.*, 784 F.2d 558, 462-63 (4th Cir. 1986), in which we opined in dicta that an intentional action would not be covered by policy language covering "negligent acts, errors, or omissions."

Accordingly, we agree with the district court's determination that the unambiguous phrase in the policy and the policy as a whole do not include coverage for the type of fraudulent misstatement which formed the basis of the civil judgment against Bakker.[2]

III.

For the foregoing reasons, we affirm the district court's summary judgment for ERC. The PTL policy does not include coverage for intentional misstatements, and ERC has no duty to indemnify Bakker for the civil judgment levied against him for common law fraud.

AFFIRMED

[2]So holding, we need not consider ERC's alternative contention that if the policy were read as covering the fraud here in issue, it would be void as against public policy. *See Graham v. James F. Jackson Assocs., Inc.*, 352 S.E.2d 878, 881 (N.C. App. 1987) ("The general rule prohibiting insurance against liability for criminal acts advances a legitimate public policy interest against relieving a wrongdoer from responsibility for his own wilful and wrongful act, in order that the commission of such acts not be encouraged.").

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 24, 1992

No. 91-2299
CA-90-129-C-C-P

EMPLOYERS REINSURANCE CORPORATION
Plaintiff - Appellee

v.

JOSEPH W. TEAGUE; HELEN B. TEAGUE, STEVEN ALLEN BARKER; RITA STRAHOWSKI; SWANNEE BECK, Lifetime Partners of PTL, as representatives of a nationwide class consisting of 150,290 Lifetime Partners and of 27,839 persons who have partially paid for Lifetime Partnerships
Defendants - Appellants

and

JAMES O. BAKKER; DAVID A. TAGGART; AIMEE CORTESE
Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellants filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the

suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Phillips, with the concurrence of Judge Widener and Judge Kaufman, Senior District Judge, sitting by designation.

For the Court,

/s/ Bert M. Montague

Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
C-C-90-129-P

EMPLOYERS REINSURANCE CORPORATION,	)	
Plaintiff,	)	
v.	)	MEMORANDUM OF DECISION AND ORDER
JAMES O. BAKKER, DAVID A. TAGGART, and AIMEE CORTESE,	)	
Defendants.	)	
JOSEPH W. and HELEN B. TEAGUE, STEVEN ALLEN BARKER, RITA STRAHOWSKI, and SWANNEE BECK, Lifetime Partners of PTL, as representatives of a nationwide class consisting of 160,904 Lifetime Partners and of 29,805 persons who have partially paid for Lifetime Partnerships,	)	
Intervening Defendants.	)	

THIS MATTER is before the Court on Motion of the Plaintiff, filed 14 August 1991, for Partial Summary Judgment and on Motion of the Plaintiff, filed 10 September 1991, and renewed on 4 October 1991, to Strike or Dismiss and or Sever Teague Intervenors' Purported Counterclaims.

Factual and Procedural Background

This action is but a part of the litigation arising out of the fall of Jim Bakker and the consequent disintegration of PTL. As such, the factual and procedural antecedents of this action are many and complex; fortunately, not all need to be detailed here.

It is, rather, sufficient to note that in November of 1992, Plaintiff Employers Reinsurance Corporation ("ERC"), issued an insurance policy to Heritage Village Church. That policy, a Multimedia Liability Policy, Policy Number MML-044 (the "Multimedia Policy") insured Heritage Village Church and additional insureds, including Defendant Bakker and possibly Defendants Taggart and Cortese. The Multimedia Policy, renewed annually through 18 December 1987, provided the insureds with indemnification for specified losses sustained by the insureds.

In relevant part, the Multimedia policy provides:

> COVERAGE. (a) Media Liability. The Corporation hereby agrees to indemnify the Insured against such loss in excess of the applicable retention and within the limit specified in the declarations as the Insured sustains by reason of liability imposed by law or assumed under contract for damages because of injury sustained by any person or organization arising out of;
>
> (1) libel or slander or other defamatory or disparaging material;
>
> (2) invasion or infringement of the right of privacy, including unwarranted or wrongful publicity or the unlawful use of name or likeness for profit;
>
> (3) plagiarism, piracy or misappropriation of information or ideas;

(4) infringement of copyright, title or slogan;

(5) unfair competition by means of the invasion, misuse, misappropriation or infringement of literary or artistic property rights of another;

(6) trespass;

(7) negligent error, omission, misstatement or misleading statement;

committed or alleged to have been committed in the acquisition, researching, filming, videotaping, preparation, utterance or dissemination of matter published, republished, produced, distributed, leased, broadcast, telecast, cablecast, syndicated, exhibited, or advertised during the policy period by or with the permission of the insured.

Multimedia Policy, Section I. The correct interpretation of this language became necessary in November of 1987 when contributors to PTL - Lifetime Partners - filed a class action against Defendants Bakker, Taggart, Cortese, and others (the "Teague Action").

The Teague Action was tried before the Honorable James B. McMillan in Charlotte, North Carolina. On 14 December 1990, after an eight week trial, the jury found that Defendant Bakker committed common law fraud proximately causing damages of $129,618,000.00. In addition, the jury awarded the Teague Action Plaintiffs punitive damages totalling $129,618.00. The jury also found that neither David A. Taggart nor Aimee Cortese were liable for any damages to the Teague Action Plaintiffs. Accordingly, on 4 January 1991, Judge McMillan ordered inter alia that the Teague Action Plaintiffs recover of Defendant Bakker $129,618,000.00 as compensatory damages and $129,618.00 as punitive damages, plus legal interest.

In the interim, on 27 April 1990, ERC brought this action, seeking a declaratory judgment that "the Multimedia Policy does not provide any coverage for any claims asserted in the Teague

Class Action and that ERC has no obligation to defendants in connection with the Teague Class Action or the Multimedia Policy." Complaint of the Plaintiff at 8 (27 April 1990). On 30 May 1990, the Teague Action Plaintiffs moved to intervene as a matter of right in this action. On 9 August 1990, this Court denied the Teague Intervenor's Motion. On 26 December 1990, the Teague Action Plaintiffs renewed their Motion to Intervene. This Court, on 8 March 1991, again denied the Teague Intervenor's Motion. The Teague Intervenors appealed, and on 25 April 1991, the Fourth Circuit Court of Appeals reversed, holding that the Teague Action Plaintiffs were entitled to intervention as a matter of right.

Accordingly, on 11 July 1991, this Court ordered that the Teague Action Plaintiffs be allowed to intervene as a matter of right in this action. On 31 July 1991, the Teague Intervenors filed an amended answer and counterclaim setting forth contract and tort claims against the Plaintiff.

Following intervention by the Teague Action Plaintiffs, ERC filed the Motion for Partial Summary Judgment now before the Court. Subsequently, on 28 August 1991, the Teague Intervenors moved for a stay of the Plaintiff's Motion for Partial Summary Judgment or for an extension of time in which to respond. This Court, on 14 September 1991, denied the Intervenor's Motion to Stay. On 10 September 1991, the Plaintiff moved to strike or dismiss the purported counterclaims of the Teague Intervenors. In addition, other non-dispositive Motions have been filed by the parties. Those Motions are not now before the Court.

Discussion

Summary judgment is appropriate when the pleadings, responses to discovery, and the record reveal that no genuine issue of any material fact exists and that the moving party is entitled to

judgment as a matter of law. See Rule 56(c) of the Federal Rules of Civil Procedure. The party moving for summary judgment has the initial burden of showing that no genuine issue of any material facts exists and that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). After the moving party has met its burden, the non-moving party must come forward with specific facts showing that evidence exists to support its claims and that a genuine issue for trial exists. Id.; Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); see F.R. Civ. 56(e) (in response to motion for summary judgment, "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial"). When considering motions for summary judgment, courts must view facts and inferences in the light most favorable to the party opposing the motion for summary judgment. Matsushita, 475 U.S. at 587-88; United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). When, however, the evidence from the entire record could not lead a rational fact-finder to find for the non-moving party, no genuine issue for trial exists and summary judgment is appropriate. Matsushita, 475 U.S. at 587.

Here, the Court has before it Plaintiff's Motion for Partial Summary Judgment; Plaintiff's Brief in Support of Motion for Partial Summary Judgment; Plaintiff's Appendix of Materials in Support of Motion for Partial Summary Judgment; Defendants' Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment; Defendants' Affidavits for Response to Plaintiff's Motion for Partial Summary Judgment; Plaintiff's Reply Brief in Support of Partial Summary Judgment; and Defendants' Reply in Opposition to

Plaintiff's Motion for Partial Summary Judgment. These materials state in thorough detail the competing contentions of the Parties.

In the end, those contentions revolve around a single clause of the Multimedia Policy. As such, Plaintiff's Motion for Partial Summary Judgment calls upon the Court to correctly interpret that clause. Not surprisingly, ERC and the Teague Intervenors put forth mutually exclusive interpretations of the questioned clause.

As noted above, the Multimedia Policy provides that ERC will indemnify the insureds for losses arising out of the "negligent error, omission, misstatement or misleading statement" of the insureds. Multimedia Policy, Section I(a)(7). The Teague Intervenors argue that this clause includes intentional misstatements or misleading statements, and thereby provides coverage for losses occasioned by fraud. In contrast, ERC argues that only negligently made misstatements or misleading statements are included within this clause. As such, misstatements or misleading statements intentionally made to defraud are not within this clause. The importance of this distinction is related to the fraud judgment obtained by the Teague Intervenors in the Teague Action: only under the interpretation offered by the Intervenors does ERC suffer an obligation arising from that judgment.

This Court, faced with these two opposing interpretations, must examine the policy and determine which of the offered interpretations is proper. This question is one of the law. Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co., 276 N.C. 348, 354, 122 S.E.2d 518, 522 (1970). In answering this question, the Court must turn for guidance to well-established rules of construction. Id. The Court's objective in this inquiry must be to determine the coverage intended by the Parties when ERC issued the policy. Id.

As an initial matter, the Court notes that it is here

considering the propriety of summary judgment. In a case turning upon the interpretation of language in an insurance policy, summary judgment is appropriate only where the language is unambiguous. Further, no language is unambiguous if it is susceptible to two reasonable interpretations. Radiator Specialty Co. v. First State Ins. Co., 651 F.Supp. 439 (W.D.N.C. 1987), aff'd per curiam, 836 F.2d 193 (4th Cir. 1987) (quoting American Fidelity & Casualty Co. v. London & Edinburgh Ins. Co., 354 F.2d 214, 216 (4th Cir. 1965)).

In assessing the ambiguity of language contained in an insurance policy, a court must take care to recall fundamental principles long ago noted by the North Carolina Supreme Court:

> [A]mbiguity in the terms of an insurance policy is not established by the mere fact that the plaintiff makes a claim based upon a construction of its language which the company asserts is not its meaning. No ambiguity . . . exists unless, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend. . . . If it is not, the court must enforce the contract as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policy holder did not pay.

Wachovia, 276 N.C. at 354, 122 S.E.2d at 522 (citations omitted). In addition, unless the context clearly requires otherwise, nontechnical words must be interpreted in a manner consistent with the sense such words are used in ordinary speech. Id.

The clause at issue here is short: it contains only seven words. The Court has reviewed carefully that clause and the entire Multimedia Policy. The Court has also considered the arguments of the Parties and relevant legal authority. Having done so, the Court finds that the clause "negligent error, omission, misstatement or misleading statement" is not reasonably susceptible of two varying interpretations.

As noted by both ERC and the Teague Intervenors, the questioned clause is an elliptical construction. Although the Teague Intervenors protest otherwise, such grammatical devices are commonly used in both speech and writing. See e.g., H. Fowler, The Little, Brown Handbook 251 (2d ed. 1983). As Professor Fowler notes, elliptical constructions "omit words not necessary for meaning." Id. Professor Fowler illustrates: "Some people heat by oil, some (heat) by gas, others (heat) by electricity." Id. In the quoted example, the words in parentheses can be omitted without disturbing the clarity or meaning of the sentence.

So it is with the clause, "negligent error, omission, misstatement or misleading statement." It simply is not necessary to write "negligent error, negligent omission, negligent misstatement or negligent misleading statement" to ensure clarity of meaning or purpose. That "negligent" modifies each of the four nouns in the clause is entirely consistent with common usage and, most important, with the intent of the Parties. For, if as the Teague Intervenors assert, "negligent" modifies only "error," the clause is meaningless. The Parties could not have intended to cover only negligent errors, but then also to cover intentional omissions, misstatements, or misleading statements. Such a construction would be internally inconsistent and would, in effect, delete "negligent" from the clause. See e.g., Golf Course Superintendents Ass'n of America v. Underwriter's at Lloyd's, London, 761 F.Supp. 1485, 1490 (D.Kan. 1991) ("It would be self-defeating to limit the definition of 'wrongful act' to negligent acts, but at the same time cover intentional errors or omissions").

Because the Court finds that the clause here at issue is not reasonably susceptible to two conflicting interpretations, the parol evidence offered by the Teague Intervenors is not

admissible. See e.g., United States for West Chester Electric & Electronics Co., Inc. v. Sentry Ins., 774 F.2d 80, 84 (4th Cir. 1985) ("Parol evidence is inadmissible to vary the terms of an unambiguous agreement"); Radiator Speciality, 651 F.Supp. at 440 (only an ambiguous provision justifies introduction of extrinsic evidence). Where the Court can, as here, examine questioned language and determine the unambiguous meaning of that language, it is of no moment what other documents provide or what insurance experts proclaim. Thus, the Teague Intervenors cannot meet their burden of demonstrating "specific facts showing that there is a genuine issue for trial." F. R. Civ. P. 56(e). Summary Judgment, then, is appropriate for the Plaintiff on this issue.

Finally, the Court finds that given the Court's interpretation of the Multimedia Policy and consequent entry of Summary Judgment, the counterclaims of the Teague Intervenors are without merit. In brief, those claims assert that the Plaintiff refused, in bad faith and in breach of the Multimedia Policy, to investigate, settle, or pay the claims of the Teague Intervenors. This Court has found that the Multimedia Policy does not extend to fraud. Given that the Teague Intervenors have a judgment against Defendant Bakker grounded in common law fraud, it is apparent the Plaintiff had no duty to investigate, settle, or pay the claims of the Teague Intervenors. Accordingly, the Court will dismiss the counterclaims of the Teague Intervenors.

Conclusion

The Court has considered carefully the arguments of the Parties, the language of the Multimedia Policy, and relevant legal authority. Having done so, the Court finds that the clause "negligent error, omission, misstatement or misleading statement" is not reasonably susceptible to two alternative interpretations. Further, the Court finds that the clause extends only to negligent

conduct, and thus does not cover losses occasioned by fraud. Accordingly, partial summary judgment is appropriate for the Plaintiff. In addition, and as a result, the Court has found that the counterclaims of the Teague Intervenors are without merit and should be dismissed.

NOW, THEREFORE, IT IS ORDERED that the Motion of the Plaintiff for Partial Summary Judgment be, and hereby is, GRANTED.

IT IS FURTHER ORDERED that the Motion of the Plaintiff to Strike or Dismiss Counterclaim be, and hereby is, GRANTED.

This the [16th] day of October, 1991.

[ROBERT D. POTTER]
ROBERT D. POTTER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action C-C-90-0129-P

EMPLOYERS REINSURANCE CORPORATION, Plaintiff, v. JAMES O. BAKKER, DAVID A. TAGGART, and AIMEE CORTESE, Defendants. JOSEPH W. and HELEN B. TEAGUE, STEVEN ALLEN BARKER, RITA STRAHOWSKI, and SWANNEE BECK, Lifetime Partners of PTL, as representatives of a nationwide class consisting of 160,904 Lifetime Partners and of 29,805 persons who have partially paid for Lifetime Partnerships, Intervening Defendants.	)	ORDER

THIS MATTER is before the Court on joint motion of all parties for entry of an order directing entry of judgment pursuant to Rule

54(b) and for a stay pending appeal of partial summary judgment.

IT APPEARS to the Court that the relief requested by the joint motion is proper.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. The Partial Summary Judgment entered by this Court on October 17, 1991 is hereby amended by adding the following additional language immediately following the words "that certain case C-C-87-514-M":

> The Court hereby determines, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay in the entry of final judgment on the claims resolved by this Partial Summary Judgment, and the Court hereby directs entry of final judgment on such claims.

2. The trial of this action and all further proceedings in this action, except as expressly provided below, are stayed until the mandate issues from the Court of Appeals in any appeal from the entry of Partial Summary Judgment or the dismissal of such appeal, whichever occurs first.

3. The foregoing stay shall not apply (a) to matters relating to appeal from the Partial Summary Judgment (including but not limited to the matters relating to the record for such appeal) and (b) motions relating to the motions to dismiss the Teague Intervenor's crossclaims filed by the other defendants; provided, however, that this exclusion of such motions from the stay shall be without prejudice to a motion by Teague Intervenors to stay resolution of such motions as well. The Court's decision as to whether resolution of the motions to dismiss and matters related thereto should be stayed shall be determined separately by the Court.

4. This order is without prejudice to the right of any party to seek limited relief from the stay should future circumstances so warrant.

This the [13th] day of November, 1991.

[Robert D. Potter]
Robert D. Potter
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
C-C-90-129-P

EMPLOYERS REINSURANCE CORPORATION, Plaintiff,	)	
v.	)	ORDER
JAMES O. BAKKER, DAVID A. TAGGART, and AIMEE CORTESE, Defendants.	)	
JOSEPH W. and HELEN B. TEAGUE, STEVEN ALLEN BARKER, RITA STRAHOWSKI, and SWANNEE BECK, Lifetime Partners of PTL, as representatives of a nationwide class consisting of 160,904 Lifetime Partners and of 29,805 persons who have partially paid for Lifetime Partnerships, Intervening Defendants.	)	

THIS MATTER is before the Court on Motion of Intervening Defendants, filed 22 October 1991, to Supplement Record. On 7

November 1991, Plaintiff filed a response to the Motion of Intervening Defendants. On that same date, Plaintiff also moved to supplement the record. On 12 November 1991, Intervening Defendants filed a reply to Plaintiff's response, and on 15 November 1991, Plaintiff, by letter, informed the Court of alleged inaccuracies contained in the 12 November 1991 reply of Intervening Defendants. On 18 November 1991, Intervening Defendants, by letter, disputed these alleged inaccuracies. Further, on 15 November 1991, this Court entered a Consent Order supplementing the record. This Consent Order resolved all issues regarding supplementation of the record save for three documents and a supporting deposition and affidavit. Those documents are:

PTL DOCUMENT 85060-65

PTL DOCUMENT 85084-85

PTL DOCUMENT 85090

DEPOSITION OF ROBERT FRANCISCO (19 September 1991)

AFFIDAVIT OF JONATHAN WALLAS (22 October 1991)

Plaintiff objects to the addition of the above-noted documents on several grounds. In support of its argument, Plaintiff asserts that the challenged documents were not cited in any brief submitted to the Court by Intervening Defendants. As such, Plaintiff argues it would be improper to supplement the appellate record with these documents. Intervening Defendants respond by arguing that Plaintiff possessed two of the three documents, that the third is similar to the second, and that adding these records will not prejudice Plaintiff.

The Court has considered carefully the arguments of both Plaintiff and Intervening Defendants. Having done so, the Court finds that the Motion of Intervening Defendants is without merit. Accordingly, the Court will not allow these challenged documents to be added to the record.

Documents which were "neither filed with the district court, considered by the court, nor even before the court when it entered [the Order appealed from,]" should not be made a part of the appellate record. Kirshner v. Uniden Corp. of America, 842 F.2d 1074 (9th Cir. 1988). Intervening Defendants acknowledge that none of the challenged documents was before the Court when it granted Plaintiff partial summary judgment. Accordingly, the documents should not be added to the record. See also First Nat'l Bank of North East v. Fockler, 649 F.2d 213, 215-16 (4th Cir. 1981).

NOW, THEREFORE, IT IS ORDERED that the Final Motion of Intervening Defendants to Supplement Record be, and hereby is, DENIED.

This the [19th] day of November, 1991.

[ROBERT D. POTTER]
ROBERT D. POTTER
UNITED STATES DISTRICT JUDGE